

THE LEGAL ADVISER
DEPARTMENT OF STATE
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MEMORANDUM OF LAW

SUBJECT: Authority of the President to Repel Attempts
by an Outside Force to Gain Control of the
Persian Gulf Region

In his State of the Union address on January 23, 1980, President Carter spoke of the threat to the security of the Persian Gulf region caused by Soviet aggression in Afghanistan, and of the United States policy regarding this threat. He stated:

"Let our position be absolutely clear:
An attempt by any outside force to gain
control of the Persian Gulf region will
be regarded as an assault on the vital
interests of the United States. It
will be repelled by use of any means
necessary, including the use of military
force."

This memorandum examines the issues relative to the legal authority to give effect to the policy enunciated by the President in his State of the Union address.

I. International Law

The United Nations Charter generally prohibits the use of armed force against the territorial integrity or political independence of any State. Under the Charter it is generally recognized that the only authorized uses of force are:

- (1) those authorized by the United Nations (by the Security Council acting pursuant to Article 42 of the Charter, or, possibly, by the General Assembly under the "Uniting for Peace" resolution);* and

*This memorandum does not address the question of the competence of regional organizations under chapter VIII of Charter, which does not appear relevant to the present circumstances.

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- (2) individual or collective measures necessary to repel an armed attack (pursuant to Article 51 of the Charter).

The permissible scope of the right of self-defense under international law is unclear. However, there is respectable support for the right of a State, in the exercise of self-defense, to use force for the protection of its own nationals within the territory of another State in situations where the territorial sovereign is unable or unwilling to afford the necessary protection against imminent threat of injury or death. The United States has asserted such a right (in the Dominican Republic in 1965) and has defended its assertion by others (the Israeli rescue at Entebbe in 1976).

It is also generally recognized that the use of force in self-defense is limited by the principles of necessity and proportionality. That is, a State may use force only when other measures would not be effective in terminating the harm or threatened harm; unnecessary destruction or punitive measures in the nature of armed reprisals must be avoided; and the response may not be disproportionate to the attack being defended against. The application of these rules, of course, must be evaluated in the circumstances of each individual case.

Finally, it is clear that the right to collective self-defense permits a State which has not itself been attacked to come to the aid of a State which is the victim of an armed attack, upon the latter's request, irrespective of whether the assisting State is under any pre-existing obligation, by mutual defense treaty or otherwise, to do so.

II. The Constitution

The authority to commit the armed forces of the United States to hostilities abroad falls within the concurrent powers of the President and the Congress. Both the President and the Congress can point to textual authorities in the Constitution; the United States has sometimes become involved in international conflict as a result of legislative action, and the President has sometimes acted on his own.

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The President's independent constitutional authority to use military force where necessary to defend the nation or to protect the lives of Americans has been recognized by the courts, Durand v. Hollins, 3 Fed. Cas. 111, 112 (No. 4186) (1860), Prize Cases, 67 U.S. (2 Black) 635, 668 (1862), Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), In re Neagle, 135 U.S. 1, 64 (1889), and is supported by numerous historical examples, especially in China and Latin America.

As with other shared powers, the authority of the President to use military force is subject to the formula suggested by Mr. Justice Jackson in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952):

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate
2. When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . (See Henkin, Foreign Affairs and the Constitution, 105-106 (1972).)

Beginning in 1973, the Congress enacted a series of statutes prohibiting the use of appropriated funds to finance the involvement of United States military forces in hostilities in Indochina. (See, e.g., §13, P.L. 93-126, 87 Stat. 452.) No comparable legislation has been enacted with respect to the Persian Gulf, or any other region. The use of force in the Persian Gulf by the President would not be incompatible with any existing expression of the will of the Congress.

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On the other hand, the Congress has not given the President any additional authority to act in the region. The only relevant statute is the Joint Resolution of March 9, 1957, 71 Stat. 5, popularly known as the Middle East Resolution. Section 2 of the Middle East Resolution provides in pertinent part:

"Furthermore, the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism: Provided, That such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States."

In July 1958, when President Eisenhower, at the request of the Lebanese Government, dispatched Marines to Lebanon to protect American citizens and assist in restoring order, he was able to rely on the Middle East Resolution as well as his independent constitutional powers. However, in 1970 the Department of State informed the Congress that the Executive Branch did not rely upon the Middle East Resolution as current authority, in view of the passage of time and change of circumstances since its enactment. Subsequently, in 1973, Congress enacted the War Powers Resolution (P.L. 93-148, 87 Stat. 555), discussed below. Section 8(a)(1) of that Resolution precludes reliance upon any provision of law as authority to commit U.S. forces to hostilities unless it specifically states that it authorizes such action for purposes of the War Powers Resolution. The relevant legislative history makes clear that section 8(a)(1) was intended to bar reliance upon the several area resolutions, including the Middle East Resolution, as statutory authority to use armed force. See S.Rep. No. 220, 93d Cong., 1st Sess. 23-24 (1973).

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In the absence of any relevant action by the Congress either to curtail or to augment the President's powers to use armed force in the Persian Gulf region, the scope of the President's powers extends to some imprecise point in the twilight zone suggested by Mr. Justice Jackson. Generally, prolonged and extensive involvements, from President Polk's dispatch of forces to Mexico in 1846 to President Johnson's commitment of forces to Vietnam in 1965, have been most seriously questioned. Rescue operations of brief duration and involving limited numbers, from Tripoli in 1801 to the Mayaguez in 1975, have been generally supported by the Congress. An attempt to define the constitutional war powers of the President was considered in the War Powers Resolution, but in the end the effort was abandoned. In this connection the Congress was faced with the dilemma that a narrow statutory definition would be unconstitutional and a broad one would expand the President's powers beyond those conferred by the Constitution alone.

Section 2(c) of the War Powers Resolution states that the powers of the President to introduce United States Armed Forces into hostilities --

"are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces."

Section 2(c) may be cited as evidence of what powers the Congress admits are conferred upon the President. However, it is generally conceded that section 2(c) does not purport to be a binding, exhaustive enumeration of the President's powers. The Department of State denied that section 2(c) constituted a binding definition as early as November 1973. See letter to Senator Eagleton from Assistant Secretary Wright at 119 Cong. Rec. S20051 (daily ed. Nov. 7, 1973). Clearly, the Mayaguez incident did not fall within any of the circumstances specified in the statute. The advisory character of section 2(c) is discussed in Spong, The War Powers Resolution Revisited: Historic Accomplishment or Surrender?, 16 William and Mary L.Rev. 823, 837-841 (1976).

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In the Hearings Before the Senate Committee on Foreign Relations on a Review of the Operation and Effectiveness of the War Powers Resolution, 95th Cong., 1st Sess. (1977), a number of witnesses testified that section 2(c) could not properly be construed as an exhaustive enumeration of the President's powers. See testimony of Thomas Franck, Hearings, pp. 63-64; Monroe Leigh, Hearings, pp. 73-74; Abraham Sofaer, Hearings, p. 96; Herbert Hansell, Hearings, pp. 193-194. Indeed, Senator Javits, who originally sponsored the comprehensive approach in the Senate version of the 1973 Resolution, acknowledged that section 2(c), as enacted, was not an exclusive enumeration, and should be read together with section 8(d), which disclaims any intent to alter the Constitution's allocation of powers between the President and the Congress. See Hearings, pp. 195-196.

One purpose of the 1977 hearings was to consider a possible amendment to section 2(c) which was described in an analysis by the Committee's staff as making "mandatory the non-operative sense of the Congress statement now contained in section 2(c)." See Hearings, pp. 338-340, 344.

In addition to the situations recited in section 2(c), witnesses suggested that the President has the constitutional authority, inter alia, to protect and rescue U.S. nationals abroad, to protect U.S. embassies, to forestall a direct and imminent threat of attack upon the United States, to suppress civil insurrection, and to implement the terms of an armistice or cease-fire involving the disengagement of U.S. forces. Some of these situations were addressed in the proposed amendment to the War Powers Resolution printed at page 338 of the Hearings.

III. The War Powers Resolution

As shown in the foregoing discussion, the War Powers Resolution does not purport to augment or diminish the extent of the President's constitutional powers. The Resolution does, however, impose certain procedural constraints. In particular, if the President were to conclude in a given situation that it was both necessary and within his constitutional authority to engage the United States Armed Forces in hostilities in the Persian Gulf region, the War Powers Resolution would have a number of consequences, according to its terms. In summary, these are:

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- Before introducing forces into hostilities, the President would have to consult with Congress, if possible.
- Within 48 hours after forces were so introduced, the President would have to report to Congress on the circumstances necessitating such action, the authority for taking it, and the estimated scope and duration of the hostilities.
- At any time after a report is submitted (or should have been submitted) Congress could require the withdrawal of U.S. forces by concurrent resolution.
- After 60 days the forces must be removed unless Congress has declared war, has enacted statutory authorization or has been prevented from meeting by an attack upon the United States. (The 60-day period may be extended to 90 days if the President determines that such additional time is necessary to effect the safe removal of U.S. forces.)

A more detailed discussion of the War Powers Resolution is set out in the attached memorandum dated April 8, 1977 (Tab 1).

IV. Possible Congressional Action

During the decade from 1955 to 1965, Congress enacted six area resolutions addressing United States security concerns with respect to Formosa (69 Stat. 5), the Middle East (71 Stat. 5), Cuba (76 Stat. 697), the Western Hemisphere (H.Res. 560, Sept. 20, 1965), Berlin (H.Con.Res. 570, Oct. 10, 1962) and the Tonkin Gulf (78 Stat. 384). Two of these, the Formosa and Tonkin Gulf resolutions, contained clear delegations of authority to the President to use armed force; both have been repealed. The repeal of these grants of statutory authority, the subsequent enactment of the War Powers Resolution with its emphasis upon narrow construction of any existing or future statutory authorization to employ force, and the widely held view in Congress that the Tonkin

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Gulf Resolution represented an abrogation by Congress of its constitutional responsibilities, all militate against the likelihood that Congress would enact in the present circumstances a new, open-ended authorization for the President to use force in the Persian Gulf region. The Senate Foreign Relations Committee, in particular, is likely to follow its own advice as set out in its report on the National Commitments Resolution (S.Res. 85, 91st Cong., 1st Sess., June 25, 1969). The Committee's report suggested that any proposed resolution authorizing the President to use force should, inter alia, be specific as to the circumstances, the kind of military action authorized, the place and purpose of its use, and the duration of the authorization. See S.Rep. No. 129, 91st Cong., 1st Sess., 32-33 (1969).

At the same time, it would seem desirable to obtain from the Congress an explicit endorsement of the policy set out in the President's State of the Union address. The question is whether an expression of Congressional support could be obtained that was not so qualified and limited as to suggest a lack of national purpose rather than convey unity and firm resolve.

A possible approach might be a legislative act which clearly did not purport to be a delegation of additional powers to the President or an exception to the procedural requirements of the War Powers Resolution. If Congress retained its right to exercise judgment later on a proposed use of force in the region, it might be more willing to express its support for the President's policy.

A relevant consideration in this connection is the form in which Congress expresses itself. It might be possible to gain broader support for a concurrent resolution, which would reflect the will of both Houses but not have the force of law, than for a bill or joint resolution.

An illustrative text of a possible resolution is attached (Tab 2) as a basis for discussion within the Executive Branch and consultation with the Congress.


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